

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
High-Cost Universal Service Support)	GN Docket No. 09-51
)	WC Docket No. 05-337
)	RM -11584

**COMMENTS OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.**

January 7, 2010

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I. INTRODUCTION AND SUMMARY

By Public Notice,¹ the Commission has requested comments on a petition for rulemaking submitted by the National Cable and Telecommunications Association (NCTA).² NCTA claims many rural rate of return carriers (RLECs) receiving high-cost support face extensive facilities-based competition from unsubsidized cable voice providers, and asks the Commission to initiate a rulemaking proceeding to establish procedures for reducing the amount of universal service high-cost support provided to these carriers. NCTA asserts its approach, if adopted, would potentially save over \$2 billion per year in high cost funding.³

¹ *Comments Sought on the National Cable and Telecommunications Association Petition for Rulemaking to Reduce Universal Service High-Cost Support Provided to Carriers in Areas Where There is Extensive Unsubsidized Facilities-Based Competition*, Public Notice, GN Docket No. 09-51, WC Docket No. 05-337 and RM-11584, DA 09-2558 (rel. Dec. 8, 2009) (*Public Notice*).

² *Petition of the National Cable and Telecommunications Association for Rulemaking Reducing Universal Service Support In Geographic Areas That Are Experiencing Unsupported Facilities-Based Competition*, GN Docket No. 09-51, WC Docket No. 05-337, and RM-11584 (Nov. 5, 2009) (*NCTA Petition*).

³ *Id.* at 6.

The Commission should deny NCTA's petition and refrain from initiating the requested rulemaking. While NCTA's proposal has superficial appeal, NECA⁴ demonstrates in these comments that the supposed benefits of NCTA's proposal are illusory and far outweighed by the harms it would cause.

First, it appears NCTA has substantially overstated the extent to which RLECs actually face unsubsidized wireline facilities-based competition in their service territories. Even in areas where facilities-based competition does exist, reducing or eliminating support for the "competitive hole in the donut" (assuming some method could be found to do so) would not necessarily result in reductions in required support, and could actually lead to *increases* in funding requirements for remaining high-cost portions of RLEC study areas.

NCTA's proposed "two step" process for determining universal service support reductions would also create a costly procedural nightmare, embroiling both RLECs and the Commission in unending and pointless litigation over whether competitive "triggers" have been reached in particular areas, and the extent to which universal service support is "necessary" to serve particular non-competitive regions. Universal service support would become inherently unpredictable, in violation of section 254 of the Act, and prospects for further deployment of broadband networks and services in rural areas would likely vanish.

⁴ See generally 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). While NECA's primary responsibilities involve preparation of interstate access tariffs and administration of related revenue pools, NECA is also responsible for collecting certain high-cost loop data from its member ILECs, and has served as administrator of the interstate Telecommunications Relay Services (TRS) fund since that fund's inception in 1993. NECA also conducts extensive training for its member companies and other industry participants, publishes reports and studies relating to its member companies' technical service capabilities and cost characteristics, and files at the Commission's request quarterly reports of interstate access usage levels.

Since taking office last year, Chairman Genachowski has made clear that future Commission policy decisions must be “fact-based and data-driven.”⁵ Application of this standard in the present case requires the Commission to deny NCTA’s petition, as it appears to be based on erroneous factual premises. The Commission should instead move forward with developing workable universal service reforms, focused on promoting broadband deployment and adoption as proposed by NECA and others in the context of the National Broadband Plan.⁶

II. DISCUSSION

A. NCTA Has Substantially Overstated The Extent Of Facilities-Based Cable Voice Competition In RLEC Study Areas.

The case for adopting NCTA’s proposal is largely built on assertions found in Dr. Jeffrey A. Eisenach’s study, *Universal Service Subsidies to Areas served by Cable Telephony* (November 2009).⁷ But while NCTA claims the Eisenach Report “documents the extensive scope of cable voice services in areas served by rural ILECs”, the actual extent of such competition appears highly overstated.

For example, Dr. Eisenach initially asserts “cable telephony was available in 743 of 1,314 rural study areas” in 2008 and “these study areas accounted for 87 percent of the rural population.”⁸ This is obviously misleading – the fact that 743 study areas with 87% of the rural population may have some degree of cable telephony competition “available” says nothing about

⁵ E.g., Remarks of Chairman Julius Genachowski to the Staff of the Federal Communications Commission (June 30, 2009), at 4.

⁶ See e.g., NECA Comments, GN Docket Nos. 09-47, 09-51 and 09-137 (Dec. 7, 2009) (*NECA December 7 Comments*).

⁷ Jeffrey A. Eisenach, Ph.D, *Universal Service Subsidies to Areas Served by Cable Telephony*, (Nov. 2009) (*Eisenach Study*).

⁸ *Id.* at 17.

the actual coverage of cable telephony competition in rural areas.⁹ A rural study area might have 10,000 households, with cable voice available to only 10 percent – yet all 10,000 are counted in this “household availability” statistic.

The actual percentage of rural household coverage supported by the study is a more modest 43%.¹⁰ But even this statistic appears exaggerated. Dr. Eisenach identifies only 83 rural study areas where cable telephony competition is supposedly available to substantially all (i.e., > 95%) households within the relevant RLEC study area. Moreover, those study areas are said to encompass only about 4% of rural households.¹¹ In other words, despite NCTA’s hyperbolic claims, what the Eisenach study really shows is in the vast majority of RLEC study areas where cable telephony competition is “available,” that availability only extends to a portion of the area.¹²

Even at lower penetration levels, the Eisenach study appears to exaggerate the extent of cable voice competition in rural areas. According to Dr. Eisenach, his analysis of the spread of cable telephony in rural America is based on data from *Warren’s Cable Factbook*.¹³ Dr. Eisenach claims the *Factbook* information is provided in Geographic Information System (GIS)

⁹ Forty-five percent of NECA TS pool members report competition from cable companies in some portion of their study areas. *Trends 2009*, National Exchange Carrier Association, Inc. (2009) (*Trends 2009*).

¹⁰ *Eisenach Study* at 16.

¹¹ *Id.* at 18. This number is derived from information contained in the Eisenach report and may not represent an accurate count of rural households.

¹² This fact, among others, may explain why few cable voice providers have sought Eligible Telecommunications Carrier (ETC) status. If such carriers cannot actually show they offer service “throughout the service area,” as required under section 214(e) of the Act, they cannot qualify as ETCs.

¹³ *Eisenach Study* at 15.

format, which allows cable system boundaries to be matched with ILEC study area boundaries.¹⁴

Dr. Eisenach further states the various data analyses in his report are based on matching cable system service territories with 1,314 RLEC study areas using an unspecified GIS software program.¹⁵

Dr. Eisenach is not the first to attempt using these data to analyze cable system coverage. A recent study for the State of Wyoming by CostQuest Associates also considered using this information to analyze cable system coverage but “after review with various stakeholders”, CostQuest decided to use an alternate approach, apparently because the *Factbook* information on cable system boundaries appeared to overstate cable coverage areas.¹⁶

NECA’s own analysis bears this out. Since Dr. Eisenach provides only summary information regarding his conclusions and none of the underlying data produced in his study, it is somewhat difficult to validate his results. Nevertheless, NECA obtained access to *Warren’s Factbook* data for 2009,¹⁷ as well as 2007 Claritas data for RLEC study areas boundaries¹⁸ and Census 2000 population data, and used MapInfo GIS software in an attempt to recreate Dr. Eisenach’s results for the State of New York. The map below, generated using this process,

¹⁴ *Warren’s Cable Factbook* itself does not appear to provide the geocoded data needed to analyze cable system boundaries. Warren Communications News has, however, jointly developed with Direct Group a data product known as MediaPrints, which claims to offer geocoded information on cable system boundaries. See <http://www.warren-news.com/mediaprints.htm>.

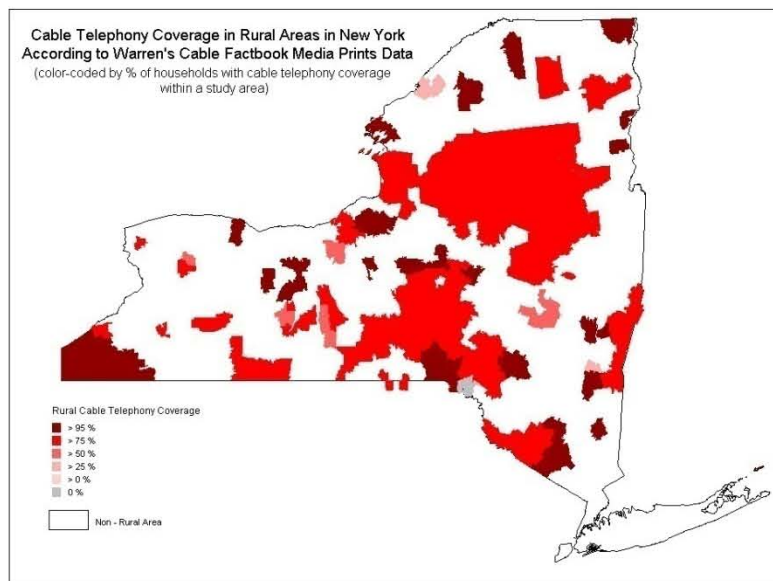
¹⁵ *Eisenach Study* at 15.

¹⁶ Mark Guttman, *Costs and Benefits of Universal Broadband Access in Wyoming*, (Oct. 24, 2006), at 9. <http://www.costquest.com/costquest/docs/CostsAndBenefitsofUniversalBroadbandAccessInWyoming.pdf>.

¹⁷ MediaPrints Cable Boundary Block Group Translation Table. (Nov. 2009), http://www.mediaprints.com/data_products.htm.

¹⁸ Claritas Wire Center Boundary Data (Feb. 2004 and June 2007).

shows the extent to which cable telephony is available in New York in a manner that appears to be consistent with information shown in Figure 5 of the Eisenach Study:

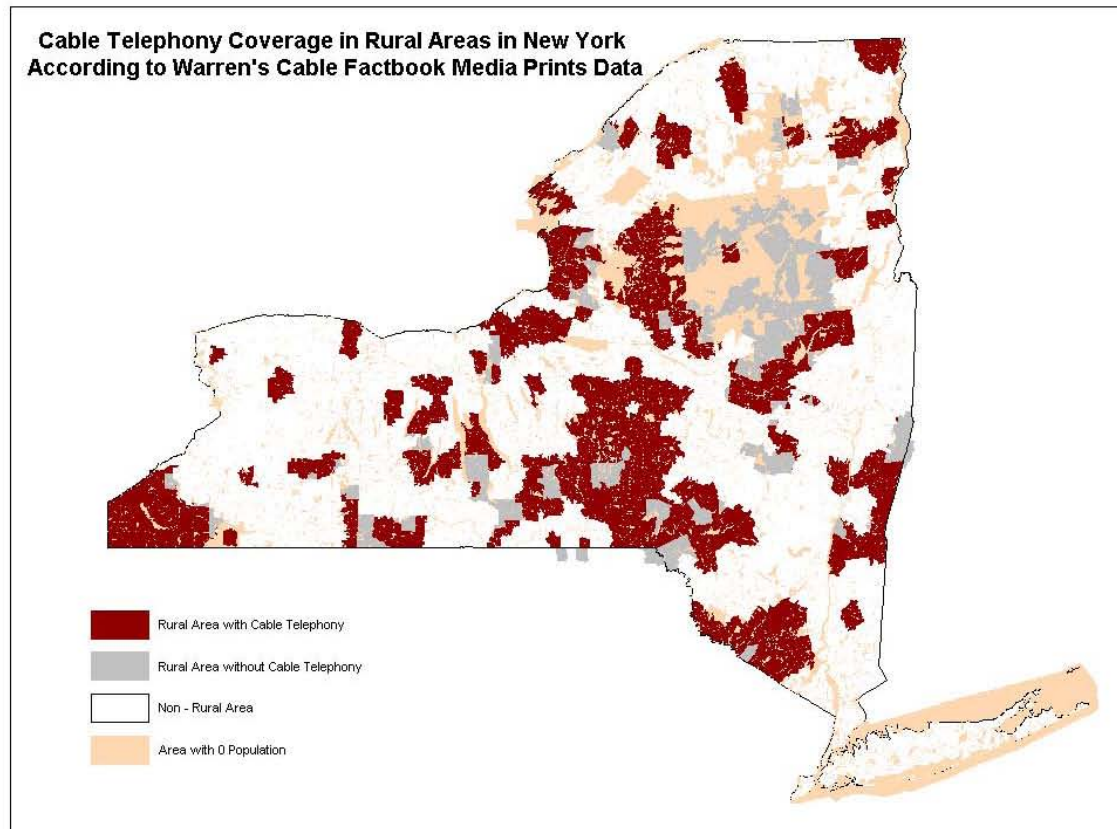


Such maps can be highly misleading, however. For example, if 50 percent of homes in a study area have cable (as determined by aggregating census block groups in a study area), the entire study area is shown as having cable service “available” at the 50% level even though actual cable build-outs may extend only to certain more populated census block groups in that study area.¹⁹ In this sense, it is possible to ascribe a uniform level of cable availability in an RLEC study area even if cable franchise boundaries do not extend across the entire study area.

When cable franchise boundaries are taken into account, a particular RLEC study area may have two different colors – one showing the parts of the RLEC study area with cable and the other showing parts without cable. Similarly, it is possible to exclude census block groups where

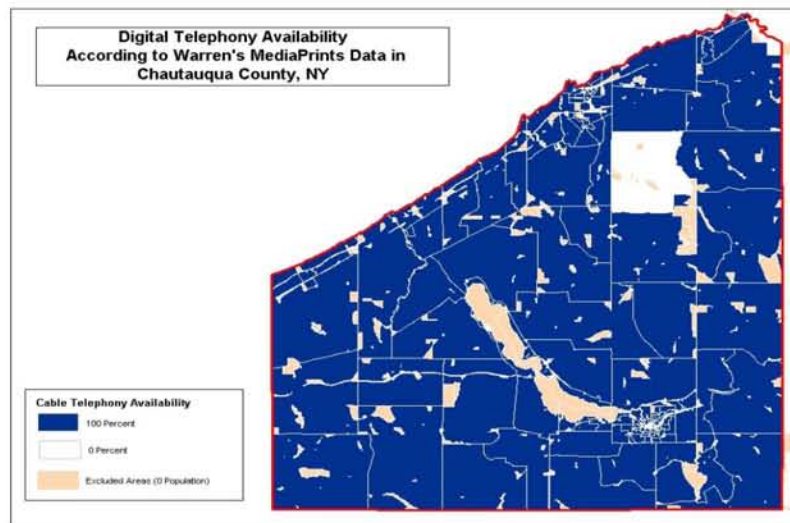
¹⁹ As even Dr. Eisenach admits, the *Warren's Cable Factbook* “does not provide detailed, street-by-street maps of cable infrastructure, which in principal could result in either overstating or understating actual coverage.” *Eisenach Study* at n. 35. Although Dr. Eisenach suggests the Warren's data more likely understates the extent of cable coverage, *see id.*, it appears the opposite is true.

no person actually lives. These methods provide somewhat more accurate assessments of cable availability in particular areas, as shown in the following map:

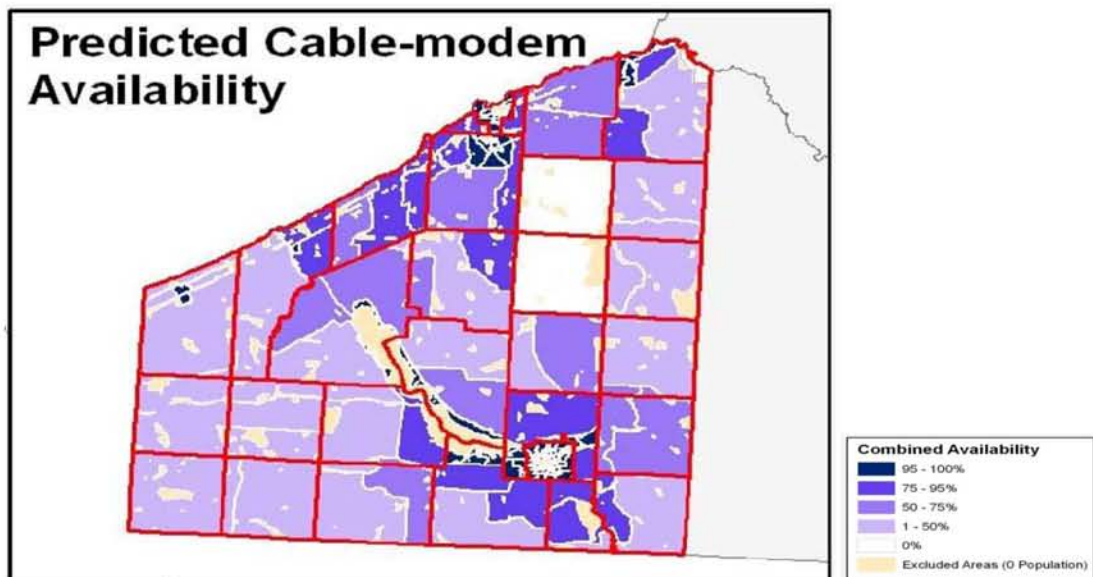


Even after these adjustments are made, the extent of actual cable availability may still be overstated by such techniques. For example, NECA obtained data on cable broadband service availability in New York State from New York State's Broadband Federal Stimulus Website, which posts maps created by the State's Office of Cybersecurity and Critical Infrastructure Coordination.²⁰ In rural Chautauqua County, located in the far western corner of upstate New York, a map created using Warren/MediaPrint data shows near-ubiquitous cable coverage:

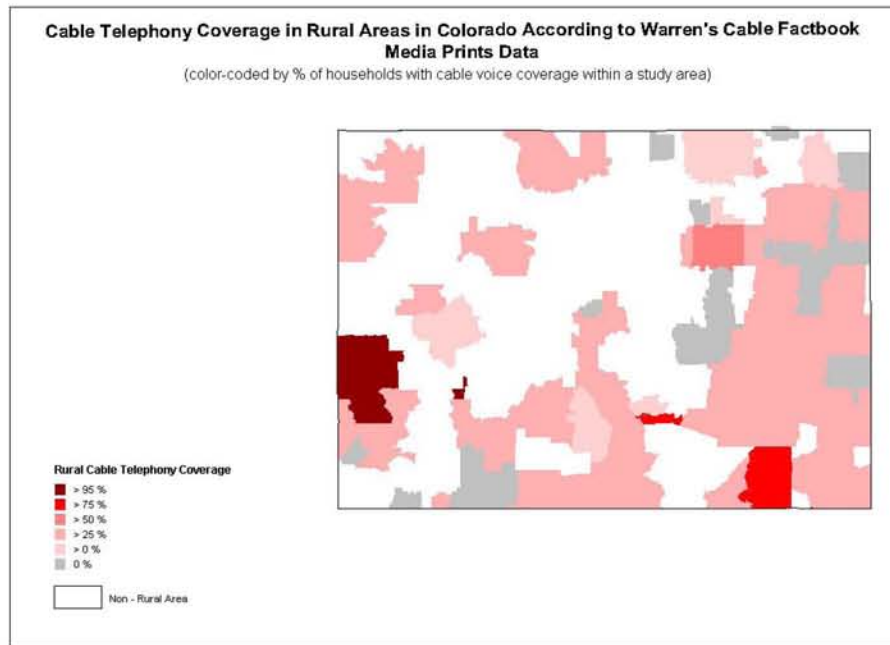
²⁰ See NY State's Broadband Stimulus Website, <http://nysbroadband.ny.gov/maps/counties.htm>.



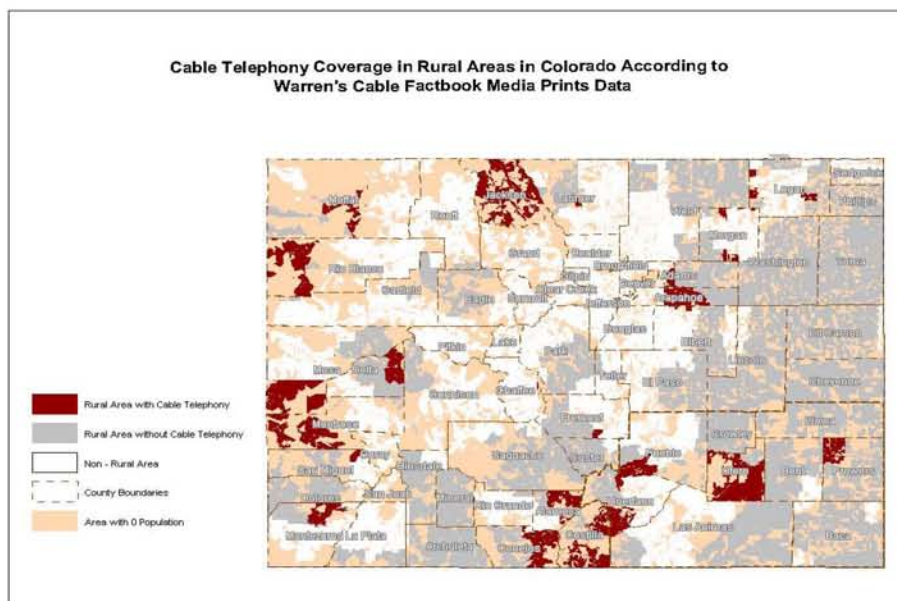
But a map of predicted cable broadband coverage for the same county taken from the New York Broadband website shows significantly less coverage outside of “in town” areas:



Similarly, a map of cable system availability in Colorado created using the Eisenach Study approach shows substantial cable system coverage in RLEC serving areas:

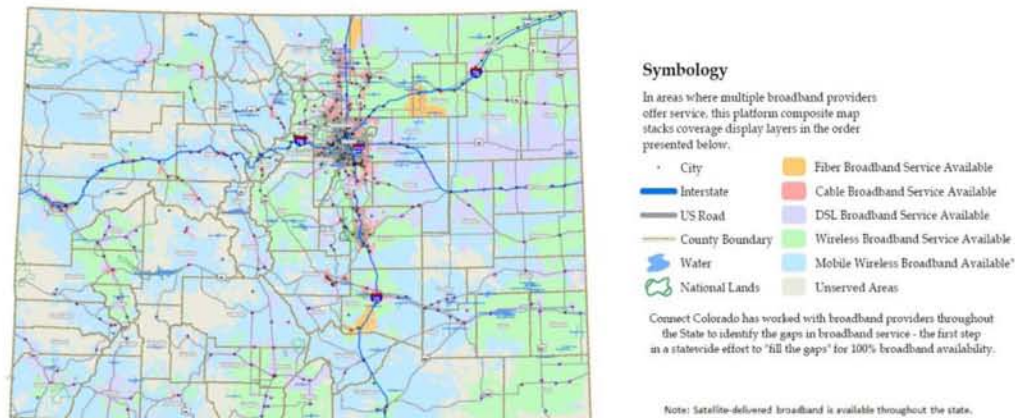


A map using the same data, but incorporating cable franchise territories and excluding zero population census block groups, produces a different result:

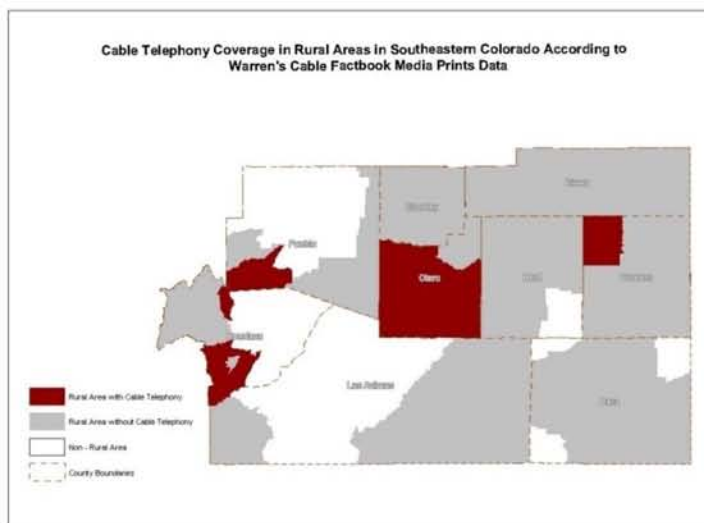


As in New York, a broadband service inventory from the Colorado Office of Information Technology²¹ shows cable broadband service available only in population centers of that state:

Broadband Service Inventory for the State of Colorado



A close-up view of the southeast corner of Colorado, depicted in the map based on Warren/MediaPrints data, shows cable broadband service as widely available in some areas:



²¹ Broadband Service Inventory for the State of Colorado, Colorado Office of Information Technology (Nov. 2009), <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251603581506&ssbinary=true>.

A close-up view of the same area, taken from Colorado’s Office of Information Technology,²² shows clearly that cable broadband service, at least, is available only in small areas around population centers:

Broadband Service Inventory for Colorado Department of Local Affairs - Southeastern Region



While such differences in mapping results can be explained by use of different data sources and data vintages, the fact cable coverage can so easily be shown as “available” in areas where no service is actually provided, or where no people live, raises a bright red flag. The Commission should exercise caution before embarking on a rulemaking based on what may, in fact, be faulty assumptions regarding the extent of cable competition in rural areas.

The Eisenach Study anticipates the claim that cable operators merely “cherry pick” low-cost customers and refrain from serving high-cost areas. In this regard, Dr. Eisenach asserts there are numerous RLEC study areas where the “portions not served by cable” appear to be no

²² *Id.*, <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251603581424&ssbinary=true>.

more expensive than areas served by cable.²³ Since Dr. Eisenach appears to base these claims on the same overstated coverage data underlying the rest of his report, his analysis of the extent to which cable companies serve “high cost” areas is likely overstated as well.

Dr. Eisenach’s reliance on topography and density statistics as predictors of the costs of serving RLEC areas is also misplaced. As the Commission is aware, past attempts to develop working “proxy models” for rural high cost areas have failed precisely because such simplistic measures do not reliably predict costs of serving a particular area.²⁴ RLECs face a wide array of obstacles in providing service, in addition to topography and/or population density.²⁵ A swampy area in Louisiana may be considered “flat” based on topographical data but phenomenally expensive to serve due to soil conditions. A mountainous area with low overall population density may nevertheless be inexpensive to serve if the population is concentrated in a single valley, and so on. These problems have led the Commission in the past to reject simplistic measures such as topography and density as proxies for rural costs. NCTA provides no basis for the Commission to reach a different conclusion now.

²³ According to Dr. Eisenach, “there are 148 study areas in which the area served by cable voice has lower population density (and thus is presumptively more costly to serve) than the area served exclusively by the RLEC. Similarly, RLECs received \$226.1 million in 112 study areas in which the severity of the topography (measured by the difference between maximum and minimum elevation) in the area not covered by cable voice was less than the severity in the area covered by cable voice.” *Eisenach Study* at 22.

²⁴ See e.g., *Federal State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 15 FCC Rcd 22149 (2000).

²⁵ The Commission acknowledged the substantial differences among RoR rural carriers, stating they are not a homogenous group and their operating conditions vary significantly. E.g., *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, Notice of Proposed Rulemaking, CC Docket No. 98-77, 13 FCC Rcd 14238 (1998), ¶¶ 16, 34; *Federal State Joint Board on Universal Service*, Rural Task Force Recommendation to the Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (rel. Sept. 29, 2000).

In sum, NCTA's claims regarding the extent to which cable telephony services are available in RLEC study areas appear to be exaggerated. In most RLEC areas where unaffiliated cable companies provide telephony services at all, such service appears to be available only in portions of RLEC study areas, and (contrary to Dr. Eisenach's claims) those portions are likely to be in low-cost areas. While there indeed may be some areas where cable coverage is substantially ubiquitous within an RLEC study area,²⁶ isolated instances do not appear to warrant initiation of the general rulemaking proceeding requested by NCTA.

B. Local Rate "Deregulation" Does Not Reliably Indicate the Existence of Local Service Competition.

The second trigger proposed by NCTA is a demonstration that the state commission or state legislature has made a decision an ILEC's local exchange service rates (whether provided on a stand-alone basis or as part of a bundled offering) no longer need to be regulated.²⁷ NCTA argues such a decision must be premised on the conclusion market forces are sufficient to ensure service in the deregulated area will be provided at reasonable rates. Ergo, in NCTA's view, "the fundamental premise for providing a government subsidy is thrown into doubt and a process for reducing, if not eliminating completely, high cost support for the ILEC should be initiated."²⁸

But RLECs may have their basic local exchange service rates "deregulated" based on a variety of factors having nothing to do with the presence or absence of facilities-based competition. For example, some states may never have chosen to regulate rates charged by telephone cooperatives, because ratepayers in these instances "own" the telephone company and

²⁶ Tellingly, Dr. Eisenach identifies only two actual examples where this may be the case. *See Eisenach Study* at 24-27.

²⁷ *NCTA Petition* at 14.

²⁸ *Id.*

determine through elected boards what rates the coop should charge.²⁹ In many states, local rate deregulation tends to be, in actuality, agreements to “freeze” local rates for a period of time, or the grant of varying degrees of pricing flexibility.³⁰ Such deregulation decisions are more often motivated by a desire to reduce or eliminate the need for the complex rate case proceedings traditionally required to change local service prices. Such proceedings are particularly burdensome for the smallest companies, who are unlikely to attempt to raise rates to unreasonable levels in any event because they are often owned and managed by local residents, who are directly accountable to family, friends and neighbors for their ratemaking decisions.

In Iowa, the General Assembly replaced municipal regulation of telephone utilities with a comprehensive plan of state-level regulation in 1963.³¹ The enabling legislation also exempted most small LECs in Iowa from any rate regulation whatsoever, years before anyone even contemplated local telephone service competition.

But even where deregulation is associated with some degree of competition, states have adopted different definitions and tests for determining “competitive markets” and each has chosen to apply various flavors of rate regulation based on individual circumstances. Different rules may apply depending on the regulatory status of the carrier, market demographics (urban vs. rural markets, population density), and type of service at issue. States generally regulate the retail pricing of larger price-cap regulated carriers differently than the smaller RoR ILECs, and a

²⁹ See Research on the Economic Impact of Cooperatives, University of Wisconsin Center for Cooperatives, <http://reic.uwcc.wisc.edu/telephone>.

³⁰ State Retail Rate Regulation of Local Exchange Providers as of September 2005, NRRI (April 2006), at 2, <http://nrri.org/pubs/telecommunications/06-05.pdf> (2006 *NRRI Study*).

³¹ 1963 Iowa Acts, S.F. 11, §1.3. The exception to rate regulation now extends to for-profit telephone utilities serving no more than 15,000 customers or access lines. IOWA CODE §476.1.

number allow RoR ILECs to opt into different forms of alternative regulation. According to the National Regulatory Research Institute (NRRI):

The most common trend . . . is to regulate the rates of the large incumbents under a price cap plan while maintaining smaller incumbents under ROR regulation Although many smaller operators decided to remain under ROR, some have opted for different forms of alternative regulation, ranging from streamlined ROR with some pricing flexibility (Wisconsin) to pricing flexibility (Indiana), and from a mix of rate freeze and deregulation (Michigan) to price cap regimes or price-based regulation (North Carolina, Ohio, South Carolina, and Wisconsin).³²

Thus, contrary to NCTA's claims, a decision by state regulators to "deregulate" retail rates does not "sever[] the connection between the receipt of universal service funding and the reasonableness of a provider's rates."³³ States appear to deregulate local service rates for a variety of reasons, including factors other than the presence of competition. Deregulation may also take many forms, including some degree of pricing flexibility, which is not the same as full deregulation. Thus, the fact a state has "deregulated" local rates does not indicate a need for an inquiry aimed at revising the amount of universal service funding for a rural ILEC.

C. Disaggregating High-Cost Support To Smaller Geographic Areas Would Not Necessarily Result In Reduced Support Payments.

While NCTA overstates its likely extent, facilities-based cable telephony competition clearly exists in portions of many RLEC study areas.³⁴ Even assuming it is possible to identify with precision those geographic areas with competition, however, it remains highly questionable whether reducing support amounts for competitive areas would be in the public interest. As discussed below, RLECs operate as carriers of last resort (COLRs) in their service territories, and

³² 2006 NRRI Study at 2.

³³ NCTA Petition at 16.

³⁴ Trends 2009, at 5.

must serve both the competitive “hole in the donut” as well as the “donut” itself. The presence of cable or other types of facilities-based competition in the low-cost portion of a study area does not mean the entire area is competitive or that support should be reduced. NECA also explains below that attempts to determine support for non-competitive portions of a service territory may increase, not decrease, pressure on USF funding mechanisms. Finally, NECA shows that NCTA’s proposal for limiting support to supposedly non-competitive areas is inconsistent with rational network design and costing principles.

1. NCTA’s Proposal Fails to Consider the Unequal Regulatory Obligations Placed on RLECs as Compared to Facilities-Based Cable Competitors.

It is widely understood RLECs are required to act as COLRs in their service territories and must remain ready to serve customers regardless of line losses to competitors.³⁵ NECA explained in its comments filed in response to the NBP Public Notice No. 19³⁶ how COLR duties may be articulated in the certificate of public convenience and necessity granted to an RLEC, or found in a state commission’s administrative rules or orders.³⁷ COLR obligations typically involve duties to provide service upon reasonable request by customers, obligations to extend lines to unserved or newly-built areas, requirements to obtain regulatory approval before exiting particular markets, and numerous obligations to provide free or discounted services to particular

³⁵ Regulatory law recognizes the COLR responsibilities held by incumbent LECs. *See, e.g., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 420 (5th Cir. 1999); *Office of Reg. Staff v. Public Serv. Comm’n*, 647 S.E.2d 223 (S.C. 2007); *GTC, Inc. v. Edgar*, 967 So.2d 781 (Fla. 2007).

³⁶ *NECA December 7 Comments* at 16.

³⁷ *See generally*, Carriers of Last Resort: Updating a Traditional Doctrine, NRRI (July 2009), at 3, http://www.nrri.org/pubs/telecommunications/COLR_july09-10.pdf (2009 *NRRI Study*).

classes of retail customers.³⁸ COLRs also have carrier-to-carrier duties that make it possible for the various networks to function as a single network.³⁹ States have recognized these obligations impose additional costs on affected carriers.⁴⁰

NCTA's proposal to reduce funding to RLECs where they experience losses to cable competitors would be inconsistent with the obligations imposed on RLECs to be ready to provide service throughout their service territories, and also does not recognize there is little if any cost reductions experienced by RLECs when customers choose to use an alternate provider's services.⁴¹ When these differences in regulatory obligations are taken into account, it becomes doubtful NCTA's proposal would produce meaningful savings in USF support even in areas with near-ubiquitous competition from cable providers.

NECA does not mean to suggest RLECs must be supported indefinitely regardless of the extent to which they suffer competitive service losses. It is possible, for example, a given RLEC could lose market share to the extent its "last resort" and other obligations associated with incumbency are imposed on some marketplace successor.⁴² In some urban areas, competition may progress to the point where there may be no need to impose such obligations on *any* provider. (Notably, NCTA's one-sided proposal does not include any mechanism for relieving RLECs of such obligations even in "competitive" portions of their service territories.) But so

³⁸ *Id.* at 1.

³⁹ *Id.* at 2.

⁴⁰ *Id.* at 48.

⁴¹ Some states (*e.g.*, California) even require COLRs to maintain a "warm line" to customers who have dropped service or chosen a competitive facilities-based provider, in case there is a need for emergency 911 calling capability. *See* California Public Utilities Code § 2883.

⁴² *See, e.g.*, 47 U.S.C. § 251(h)(2). *See also* *Petition of Mid-Rivers Telephone Cooperative, Inc. for an Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, Report and Order, WC Docket No. 02-78, 19 FCC Rcd 20730 (2004).

long as one carrier continues to bear unequal regulatory responsibilities, it is essential the Commission's universal service programs recognize the unique burdens associated with such obligations.

2. Attempts to Disaggregate Support Payments between Competitive and Non-Competitive Areas May Increase, Not Reduce, Pressure on USF Support Mechanisms.

In comments filed in response to the Commission's NBP Public Notice No. 19, a number of parties pointed out proposals to disaggregate support at below-study area levels could have unanticipated impacts on overall support levels. In its *December 7 Comments*, for example, NECA described an analysis of support payments for the former Northwestern Bell-North Dakota study area based on 2001 data, which showed while the study area as a whole does not qualify for support under the Commission's hybrid cost proxy model, 21 of the 35 wire centers in the state would qualify under the model if they are treated separately.⁴³ This would substantially increase model-based support in that area.

In 1996, when cost proxy models were proposed for determining USF support, NECA analyzed the effects on USF support of disaggregating cost proxy model calculations to smaller service areas, specifically at the study area level, the serving wire center level, and the census block group level. The most conspicuous observation was the support amounts rise significantly as the geographic region used to calculate the support becomes smaller. NECA concluded the reason for this is there is less averaging of high and low cost areas as disaggregation moves toward smaller service areas.⁴⁴

⁴³ NECA *December 7 Comments* at 22, citing "Wirecenter Support Spreadsheet" on FCC's Hybrid Cost Proxy Model website at <http://www.fcc.gov/wcb/tapd/hcpm/welcome.html>. Similar results can be expected in other areas with few low-cost cities and extensive rural coverage areas.

⁴⁴ NECA Comments, CC Docket No. 96-45 (Aug. 6, 1996), at 6.

Similarly, AT&T's comments on the NBP Public Notice No. 19 explained why proposals to disaggregate support for broadband services between competitive and non-competitive areas would either harm broadband deployment or fail to produce reductions in support payments:

If the Commission were to reduce or eliminate support in those parts of a study area in which a competitor is offering broadband, and keep the per-line support the same in those parts in which there is no competitor, the Commission likely would reduce the size of the fund. Of course, in that event, the incumbent would be left to serve the other, highest cost parts of the study area, without adequate support As a consequence, the incumbent ultimately would be unable to maintain and/or upgrade its network in those highest cost areas, and thus could not viably continue providing basic telephone (let alone broadband) services at affordable rates.

If, on the other hand, the Commission were to re-calibrate its high-cost support to remove the cost of serving those parts of a study area with competition, and to provide support based on the per-line costs of serving those areas without competition (which are likely to be the highest cost lines in the study area), the amount of support necessary to meet universal service objectives could remain the same, or even go up.⁴⁵

Additionally, if the Commission were to institute a mechanism requiring RLECs to exclude the *costs* of serving competitive areas, it would presumably need to exclude *revenues* associated with such areas as well.⁴⁶ Pressure on existing universal service mechanisms would

⁴⁵ AT&T Comments, GN Docket Nos. 09-47, 09-51 and 09-137 (Dec. 7, 2009), at 17. AT&T goes on to suggest that if the Commission were to reduce or eliminate high-cost support in areas in which competitors are offering broadband, it should relieve the incumbent of any COLR requirements and other regulatory restrictions (including rate regulation) in those areas. Needless to say, NCTA's proposal fails to incorporate any method for reducing regulatory obligations on incumbents, even in areas where competitive alternatives are found to exist or to consider the public policy considerations of such actions in rural study areas.

⁴⁶ Proper matching of revenues and costs has been a Commission goal for many years. *See, e.g., American Telephone and Telegraph Company, The Associated Bell System Companies Charges for Interstate Telephone Service*, Phase II Initial Decision, 64 FCC 2d 131, at ¶231, n.53 (1976); *Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles (Parts 31, 33, 42, and 43 of the FCC's Rules)*, Report & Order, 102 FCC 2d 964, at ¶15 (1985) (Use of Generally Accepted Accounting Principles within the Uniform System of Accounts); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Remand and Notice of Proposed Rulemaking, 17 FCC Rcd 3248, at ¶53 (2002).

certainly increase, as RLECs could no longer depend on revenues from averaged rates between low-cost and high-cost areas to maintain comparable rates to the higher-cost portions of study areas.

In this regard, the *2009 NRRI Study* recommended adoption of relatively *large* rather than small COLR service areas including some rural high-cost territory and some relatively lower cost territory, specifically to realize benefits from averaging low-cost areas with higher-cost areas.⁴⁷ In NRRI's view, service areas need not be congruent with those of large incumbent local exchange carriers, but larger service areas including some high-cost territory "are likely to continue to benefit from rate averaging between high-cost and low-cost areas, reducing the demand on state universal service funds."⁴⁸

3. NCTA's Proposal Is Inconsistent with Rational Network Design and Costing Principles.

NCTA's proposals regarding the "limited subset" of costs that should continue to be included in universal service funding for non-competitive areas is unreasonable and fails to reflect any realistic understanding of network design and costing principles. Under NCTA's approach, supportable costs would be limited to loop costs "for voice service", as defined in section 54.101 of the Commission's rules.⁴⁹ According to NCTA, if a competitor serves part of the study area, the RLEC must already be recovering its switching costs so those should be excluded as well.⁵⁰ The same is true in NCTA's view for interoffice transport costs.⁵¹ NCTA also believes the Commission should reduce or eliminate an ILEC's overhead costs because the

⁴⁷ *2009 NRRI Study* at 22, 26, 59.

⁴⁸ *Id.* at 59.

⁴⁹ *See* 47 C.F.R. § 54.101.

⁵⁰ *NCTA Petition* at 18, n. 47.

⁵¹ *Id.* at 19.

competitor is supposedly recovering these costs without subsidy.⁵² Finally, NCTA recommends eliminating Interstate Access Support (IAS) because, in NCTA's view, this support is not tied to specific loop costs.⁵³

The fundamental flaw in NCTA's costing approach is it incorrectly presumes a network's costs can be split into two parts: a core network, which recovers all switching, interoffice and administrative costs, and spokes or loops radiating from the core out to noncompetitive areas, which have separate costs. In reality, there is only one network and its design depends on the characteristics of the entire study area. For example, feeder cable and concentrator device locations will depend on customer locations within and outside the supposed core. The number of maintenance staff and trucks and the number of truck rolls will depend on the entire network design, not some artificially bifurcated design.

NCTA suggests support calculations should recognize the "ability of the carrier to recover network costs through the provision of both regulated and unregulated services provided over the carrier's network in non-competitive portions of the study area."⁵⁴ But NCTA fails to recognize a support mechanism that considers revenues from non-regulated sources would also need to take into account the costs of providing such services. Since many RLECs often find it unprofitable to offer long distance and other "add on" services, such as TV programming, in

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 2.

rural areas,⁵⁵ NCTA's proposal to consider such services in support calculations would probably not produce cost savings in any event.⁵⁶

D. NCTA's Proposed "Two-Step" Process Is Administratively Unworkable And Would Severely Disrupt Further Broadband Deployment In Rural America.

As noted above, NCTA proposes a two-step process by which any party may petition the Commission to commence an investigation into the level of support provided to a particular study area. The first step would require the petitioner to demonstrate the study area meets one of two competition-based triggers (*i.e.*, the petitioner could show unsubsidized wireline competitors offer service to more than 75 percent of the customers in an area or reach 50 percent of households and the remaining part of the study area has cost characteristics similar to the covered area; or the state has found competition sufficient to substantially deregulate the retail rates charged by an ILEC).⁵⁷ If one or both triggers are satisfied, under NCTA's proposal the burden would then shift to the USF high-cost recipient to demonstrate the minimum amount of support necessary to ensure non-competitive portions of the study area will continue to be served.⁵⁸

⁵⁵ *NECA December 7 Comments* at n. 57, *See also* WTA Comments at 21, Rural High Cost Carrier Comments at 8.

⁵⁶ NECA proposed that support under a new broadband mechanism be based upon a cost benchmark calculation that compares the actual costs of an individual rural broadband network provider to an urban broadband network cost benchmark. Under NECA's proposal, individual USF funding would be determined by comparing all actual regulated common carrier rural broadband network transmission costs to an urban network transmission cost benchmark established by the Commission. NECA also explained that this approach could be adapted to take into account revenues as well, without necessarily attempting to re-regulate revenues from services that have been classified as non-telecommunication services (*e.g.*, IPTV). *NECA December 7 Comments* at 20.

⁵⁷ *NCTA Petition* at 5.

⁵⁸ *I.e.*, the Commission would "identify the limited subset of ILEC costs that (1) would not be incurred but for the provision of service to customers that do not have a competitive option and

As NECA explained above, NCTA’s proposed triggers are based on an inappropriate use of industry data and do not provide a good indication of the extent of competition in an area. NCTA’s proposed methods for identifying the “minimum” amount of support needed to serve non-competitive areas are flawed as well because they fail to recognize regulatory burdens placed on RLECs as carriers of last resort, and in any event don’t properly account for the costs of serving rural areas.

Even if the Commission were to overlook these flaws, NCTA’s proposal should be dismissed because it is administratively unworkable. Under NCTA’s approach, each time a competitor asserts one of NCTA’s proposed trigger conditions has been met in a specific area, the Commission would need to conduct a complex, fact-intensive adjudicatory proceeding to determine whether those assertions are true, and if so, how much support should be considered “necessary” in that area.

Specifically, NCTA seeks to have the Commission make determinations about: 1) the actual number of households within a study area that can purchase local service from a facilities-based competitor; 2) the costs characteristics of the portion of the study area served by the competitor and of the portion of the study area not served by the competitor; and 3) whether and how much USF support would be required to sustain universal service within the portion of the study area not served by the competitor.

But no standards exist for such determinations, and answers to questions raised would likely vary from region to region and indeed may be different in every case. As a result, the Commission and interested parties might find themselves embroiled in complex “trial-type” adjudicatory proceedings potentially involving cost studies, presentations by expert witnesses,

(2) cannot be recovered through rates for the services (regulated and unregulated) provided over the network in the portion of the study area with no competition.” *Id.* at 17.

cross-examinations, and other time-consuming (and expensive) processes.⁵⁹ Because many RLECs are extremely small, however, the effort to split costs or to determine where competing facilities exist on a line-by-line basis would consume many more resources than could possibly be “saved” under NCTA’s proposal.⁶⁰

In addition to bogging down the Commission in pointless adjudicatory proceedings, NCTA’s proposal would make universal service funding inherently unpredictable, in clear violation of section 254 of the Act. Worse, NCTA’s proposal would destabilize RLEC access to the capital necessary to invest in broadband networks, thus subverting the goals of the Commission’s National Broadband Plan.

Regulatory uncertainty directly impacts small RLECs’ abilities to finance their networks and new service offerings. As CoBank recently pointed out to the Commission, it has lowered rural LECs’ access to capital by 30-40% over the last 10 years due to uncertainty about the sustainability of current cost recovery mechanisms, and expects to continue to lower maximum

⁵⁹ Determination of a petition seeking the reduction of USF support for an individual RLEC likely constitutes an “adjudication” within the meaning of both Section 551 of the APA and Part 1 of the FCC’s rules. And, while agencies are not normally required to hold trial-type evidentiary hearings, *see Bell Tel. Co. of Pennsylvania v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), such hearings may in fact be required where an agency “bases its decision on the peculiar situation of individual parties” or where there are disputes about specific facts, rather than about broader policies and conditions. *Id.* at 1266, 1268.

⁶⁰ For example, there are 26 RLECs in Oklahoma that serve fewer than 5,000 access lines each. *See* Federal and State Staff for the Federal-State Joint Board on Universal Service, *Universal Service Monitoring Report*, CC Docket No. 98-202, at Table 3.34, p. 3-220 (rel. Dec. 31, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295442A1.pdf. These small RLECs, and many others like them, may not even be able to afford to participate at all in proceedings to implement NCTA’s proposed rule. It would be patently unfair to impose on these companies a continual burden to defend support payments against baseless claims by competitors serving only portions of their service territories, particularly when the actual cost data underlying these companies’ support payments is already subject to multiple levels of review by regulators, NECA, USAC and others.

allowable leverage if regulatory uncertainty continues.⁶¹ This reduced access to financing will obviously negatively affect the ability of small rural carriers to offer high quality telecom services and deploy broadband networks in rural areas. Increasing costs then lead to increasing rates for rural customers, and could further depress broadband take rates. Rather than add to this regulatory uncertainty, the FCC should focus its efforts at this time on developing broadband universal service reforms to sustain broadband deployment and adoption in rural America.

III. CONCLUSION.

NCTA's proposal is deeply flawed and should be rejected. NCTA appears to substantially overstate the extent to which unsubsidized, competitive wireline facilities-based voice service is actually available in RLEC study areas. Even with respect to areas where such wireline facilities-based competition exists, implementing NCTA's proposal is not likely to result in any significant reductions in USF funding requirements, and may actually cause fund requirements to increase. As explained above, the proposal fails to account for key differences in regulatory obligations between RLECs as carriers of last resort and cable voice providers, and NCTA's methods for calculating support do not accurately reflect the way the service costs are incurred in rural areas. Finally, favorable Commission action on NCTA's proposal would create regulatory uncertainty for an extended timeframe that would inhibit investment in rural broadband networks and jeopardize efforts to improve broadband deployment and adoption in rural areas.

Because the harms associated with NCTA's proposal far outweigh the potential benefits, the Commission should decline to initiate the requested rulemaking proceeding and instead

⁶¹ See Letter from Sarah Tyree, CoBank, to Marlene H. Dortch, FCC, GN Docket No. 09-51, WC Docket No. 05-337 and CC Docket Nos. 96-45 and 01-92 (Dec. 16, 2009).

continue to focus its efforts on developing and implementing universal service reforms producing both sufficient and stable funding for the broadband age.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, Inc.

January 7, 2010

By:

A handwritten signature in dark ink, appearing to read "Richard A. Askoff", is written over a light gray rectangular background.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Comments was served this 7th day of January, 2010 by electronic filing and e-mail to the persons listed below.

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